Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States
October Term, 1998

Margaret Speth,

Petitioner,

vs.

Capitol Indemnity Corporation and
Frank Zillner and Virgiline Schulte
and George Fait,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTIONS PRESENTED:

1. Whether the U.S. Court of Appeals erred in allowing the U.S. District Court to impose a 300-day statute of limitation on conduct which may be challenged by the petitioner based on a state law, thus abridging the privileges and immunities of the petitioner as a citizen of the United States and denying the petitioner equal protection under federal laws in violation of Amendment XIV, Section 1 of the U.S. Constitution.

2. Whether the U.S. Court of Appeals for the Seventh Circuit erred in affirming the decision of the U. S. District Court, knowing the U.S. District Court had ignored vital information in Second Affidavit of Margaret Speth in Opposition to Defendants' Motion for Summary Judgement dated and filed in U.S. District Court July 11, 1997 and in depositions filed by plaintiff June 20,1997; and knowing the U.S. District Court did not hold any hearings on any motions or to clarify any issues.

3. Whether the United States Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court, as to call for an exercise of the United States Supreme Courts' power of supervision.

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Margaret Speth petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Seventh Circuit entered in this case March 4, 1998.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit affirmed the decision of the United States District Court for the Western District of Wisconsin which granted the motion of the defendants for Summary Judgement. The unpublished order and opinion of the U. S. Court of Appeals is included in the Appendix at A-1.

The opinion and order of the United States District Court for the Western District of Wisconsin is included in the Appendix at A-5. The judgement of the United States District Court for the Western District of Wisconsin closing the case is also included at A-28.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was entered March 4,1998.

Jurisdiction in the United States Supreme Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED:

U. S. CONSTITUTION, AMENDMENT XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The petitioner, Margaret Speth, was employed by Capitol Indemnity Corporation, hereafter referred to as CIC, as a programmer in the data processing department from June 7, 1990 to September 13, 1995. Margaret Speth had two degrees and approximately two and a half years experience in computer programming when she began working at CIC. She had a bachelor's degree in biology and two-year associate degree in data processing/computer programing.

Although she wrote approximately two hundred new programs and completed numerous projects during the five years she worked at CIC, Margaret Speth did not receive any promotions. Margaret Speth's starting salary was $17,500 a year and her salary when she left CIC was $26,700 a year. The petitioner received raises each year, except in 1992, when she filed a sex discrimination complaint against CIC.

This complaint against CIC resulted from the facts that a male employee of CIC, Karl Hauth, was given credit for work which the petitioner had performed, that the same male employee was given a $5,000 bonus for work which Margaret Speth alone had performed and that Karl Hauth received a higher salary than the petitioner, while the quality of his work was lower than the quality of her work.

The petitioner withdrew her sexual discrimination

complaint against CIC because, after talking to several managers at CIC, she thought her situation would improve.

The data processing department at CIC was composed of four people, including Margaret Speth. The other three members of the department were Frank Zillner, Karl Hauth, and Ed Boyd.

Frank Zillner was the Data Processing Manager, however he did not have a degree in any field related to data processing, computer programming or management information systems and he did not have related experience outside of CIC. He was the son-in-law of George Fait, who was the president of CIC.

Karl Hauth was hired in 1989 as a programmer/ analyst and remained in that position. Karl's salary was increased from $18,000 in 1989 to $36,000 in 1994. Karl Hauth claimed to have a bachelors degree from Carnegie Mellon; however Carnegie Mellon would not verify that Karl Hauth received a degree from that school.

Ed Boyd did not have any degrees when he started working at CIC in 1991 as a part-time night operator and did not receive any degrees during the time the petitioner worked at CIC. Between 1991 and 1994, Ed Boyd was promoted from part-time night operator to network administrator in the data processing department.

In January, 1995, the petitioner was given a project which was impossible to complete.This project is described in detail in the Second Affidavit of Margaret Speth in Opposition to Defendants' Motion for Summary Judgement and is included in this petition after this paragraph.

Margaret Speth was assigned Project #601 January 20, 1995. This project consisted of fixing a bug in Report 59. The petitioner was told the total written premium on Report 59 should match the total written premium on Karl Hauth's report, called PCOUNT. The petitioner asked Frank Zillner which data file had been used to test the PCOUNT program and she was told no data file had been used to test PCOUNT because Frank Zillner and Karl Hauth knew it was right just by looking at the code. In fact, there were several errors in the PCOUNT which the petitioner pointed out to Karl Hauth and which he corrected. The history section on the first page of the PCOUNT program shows two corrections made on 3/14/95 and 4/28/95.

Even after testing Karl Hauth's PCOUNT program and pointing out the errors to him, the petitioner could not get the same totals on Report 59 that were on PCOUNT. Margaret Speth wrote a new program called RPT059 and wrote another program, called STATRPT to test RPT059. The petitioner tested PCOUNT again with a modified version of STATRPT. Ms. Speth told Frank Zillner that the total written premium on her report,RPT059 and on Report 59 were year-to-date totals and that they matched the year-to-date totals on Report 004, which was considered to be correct. Since Report 59 and RPT059 were year-to-date they did not include records with a book date before January 1st of the

report year. Ms. Speth also told Frank Zillner that Karl Hauth's program, PCOUNT, included all records with a book date before or equal to the report date. This difference in criteria for Report 59 and PCOUNT caused a small difference in the totals on the reports. Although the petitioner explained this situation to Frank Zillner at least two times, Frank insisted that Report 59 had to have exactly the same totals as the PCOUNT report.

Frank Zillner would not give the petitioner any new projects until she got the results he wanted on Project # 601, which was impossible. On September 13, 1995, nine months after receiving project #601, Margaret Speth found her working conditions to be intolerable and was forced to resign.

B. LEGAL PROCEEDINGS

On October 27, 1995 Margaret Speth filed a second sex discrimination complaint with the Wisconsin Department of Industry, Labor and Human Relations-Equal Rights Division.

Dissatisfied with the handling of her case by the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations, the petitioner asked that her case be transferred to the Equal Employment Opportunities Commission on March 26, 1996. When the

EEOC had not come to a conclusion regarding her claim on October 10, 1996, Margaret Speth informed the EEOC that she decided to file suit against the defendants privately. The petitioner received a right to sue letter and on October 11, 1996 filed a complaint against Capitol Indemnity Corporation, George Fait, Frank Zillner and Virgie Schulte in U.S. District Court.

Although the petitioner had asked for hearings regarding this case, no hearings were ever held.

The defendants filed a motion for summary judgement on April 14, 1997.

On July 11, 1997 Margaret Speth filed the Second Affidavit Opposing Defendants' Motion for Summary Judgement. This affidavit is included on the U. S. District Court Docket.

Defendants' motion for summary judgement was granted and the case was closed July 11, 1997.

Margaret Speth, filed an appeal with the U.S. Court of Appeals for the Seventh Circuit. On March 4, 1998, the U.S. Court of Appeals affirmed the decision of the U.S. District Court.

Now the Petitioner, Margaret Speth, is asking the U.S. Supreme Court to grant her petition for a writ of certiorari in order to see this case to a fair and just conclusion.

REASONS FOR GRANTING THE WRIT

The United States Supreme Court should grant the petitioner's writ for the following reasons:

1. IMPOSITION OF THE 300-DAY STATUTE OF LIMITATION BASED ON WISCONSIN EMPLOYMENT LAW §§ 14.181, 14.247 (1994) VIOLATES U. S. CONSTITUTION, AMENDMENT XIV, SECTION 1.

In the Opinion and Order entered March 25, 1997 in U.S. District Court for the Western District of Wisconsin District Judge Barbara B. Crabb writes " a party bringing a Title VII suit in Wisconsin may not challenge conduct that has occurred more than 300 days before the party filed its charge with the state Equal Rights Division or Equal Employment Opportunities Commission". Appendix P. A-16 This is clearly a violation of Amendment XIV, Section 1 of the United States Constitution which states "No State shall make or enforce any law which shall abridge the privileges and immunitites of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." Margaret Speth enjoys the same rights as all other citizens of the United States and therefore should be able to challenge conduct which occurred more than 300 days before she filed her case with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations or the EEOC.

2. VITAL INFORMATION PRESENTED BY THE PETITIONER WAS NOT CONSIDERED IN THE LOWER COURTS' DECISIONS.

The U.S. District Court and U.S. Court of Appeals have clearly omitted documents and information, which should have been considered in making their decisions. On page A-25 of the Appendix, District Judge Barbara Crabb states "Similarly, plaintiff's allegation that she was given no work other than an assignment she found "impossible" is insufficient to show that her working conditions were intolerable. She does not specify how long she worked on the assignment or what the practical effects of the assignment were on her working environment."

The petitioner showed very clearly in her Second Affidavit Opposing Defendants' Motion for Summary Judgement that the assignment she was given, Project #601 WAS impossible and that she worked on the assignment for nine months. A description of this last project is included on pages 5-6. Obviously District Judge Barbara B. Crabb did not consider the information of this document.

Important information was also included in the depositions of Karl Hauth and Allen Schmidt but the petitioner discovered they were not part of the record. The Petitioner had understood that the entire record would be considered by both the U.S. District Court and U.S. Court of Appeals, since she had not agreed to eliminate anything from the record. In the deposition of Karl Hauth, Margaret Speth presented a description of a problem that occurred at

Capitol Indemnity. This information was given to Margaret Speth in February, 1993 by Karl Hauth *and shows Karl* Hauth's problem-solving ability:

February 1, 1993 - It was discovered that the just completed January month end had been run with a report date of February. Frank Zillner and Ed Boyd began rerunning the month end.

February 2, 1993 - Brian Frank discovered that January business had been dumped into both January and February accounting periods in the Open Item File. Frank and Karl Hauth determined this was due to restoring the RDK75 File from the RMBKUP tape (which is *after* the dump). Karl restored the RDK75 from the last Stat Cycle backup of the month and re-ran the Open Item portion of the month end.

February 8, 1993 - A question from Eileen Zentko in accounting prompted Karl to check into the advanced business balancing of the month end.

February 9, 1993 - Karl and Sandee Johnson verified that the advanced business processing was indeed out of balance as far as the Open Item System was concerned. They also improved the balancing procedure that Accounting uses to include balancing the advanced business processing. Karl determined that the Advanced Business File (RDK09) also contained two copies of the advanced busi-

ness coded in January. Karl created a new RDK09 file which was to contain only one copy of that, but also would contain the advanced business which had been released in January. This would allow that business to get into the Open Item system naturally during the February Month End.

February 10, 1993 - Joel Fait is asking questions about the month to date production report (PREMIUMS). It seems the numbers in the advanced column fell dramatically. This was a direct result of the new RDK09 file Karl had made the day before. After some research Karl determined that the RDK09 he had created was not what he intended it to be. Further, he determined that changing the RDK09 file was not the correct solution, as that would cause the management reports to over state the written. Rerunning the whole month end again was out of the question. To get the advanced business booked in January into the Open Item file now required a manual dump, either in the middle of the month, or during the February Month End.

Much consulting with Accounting followed. Eventually it was decided to perform a manual dump in the middle of the month. That would allow time for additional corrections to take place if they were necessary. The items would be dumped into the January accounting period, as that was where they belonged anyway, we didn't want to lose the cash flow, and the agents still had a good bit of time to handle the information. We would also send out statements showing only those items which had been omit-

ted from the previous statements.

February 11, 1993 - Karl restored the RDK09 file from the second January Month End. That file contains the correct records to keep the management reports on track. Then he ran a month end on the test system with empty RDK75, RDK10 (Month To Date Premiums) and RDK04 (Installments) files. This produced statements which contained only the items omitted. After running an aging report to audit the current balances, the RDK75 file was copied to the test system, where the same procedure was again followed. The RDK75 file was then copied back, and another aging report was run. Bob McLaughlin, Sandee and Karl all worked on balancing the procedure just completed. As of the 11th everything appears to have worked correctly.

This is an exact account of a situation which occurred at Capitol Indemnity. This is just one example which shows that Karl Hauth was not more qualified or more deserving of a higher salary than the petitioner.

3. THE PETITIONER'S SITUATION AT CAPITOL INDEMNITY WAS EXACTLY THE TYPE OF SITUATION WHICH THE EQUAL PAY ACT, NATIONAL LABOR RELATIONS ACT AND TITLE VII OF THE CIVIL RIGHTS ACT WERE MEANT TO ELIMINATE.

1) A less qualified male (Ed Boyd) was trained and promoted instead of a more qualified female (Margaret Speth).

2) A male employee (Karl Hauth) was paid almost $10,000 more a year than a female employee when their jobs required the same level of skill and the male employee made more mistakes than the female employee.

3) An employee (Margaret Speth) was forced to leave a position because her working conditions became intolerable.

CONCLUSION

For the foregoing reasons, the Petitioner, Margaret Speth, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

July 30, 1998

Respectfully submitted,

Margaret Speth

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 19, 1998*
Decided March 4, 1998

Before
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Diane P. Wood, Circuit Judge

Margaret Speth,
Plaintiff-Appellant,

Appeal from United States District Court for the Western District of Wisconsin

No. 97-2975 v. No. 96-C-855-C

Capitol Indemnity Corp., Frank Zillner, Virgie Schulte, and George Fait,
Defendants-Appellees.

Barbara B. Crabb,
Judge

ORDER

Margaret Speth, a former computer programmer, claimed that the Capitol Indemnity Corporation discriminated and retaliated against her in violation of Title VII, 42 U.S.C. § 2000e, and the Equal Pay Act. She also

alleged various state law claims, including fraud, deceit, misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and wrongful discharge. She claimed she was forced to resign after she was repeatedly passed over for promotion and pay increases, and was denied additional training and opportunities that her male counterparts were not. The district court dismissed Speth's Title VII claims against the individually-named defendants, as well as her state law claims based on fraud, deceit, and misrepresentation. After depositions and discovery occurred, the district court, in a lengthy and thorough opinion, granted summary judgement for the defendants on the remaining claims.

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*After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and record. *See* Fed. R.App.P. 34(a); Cir.R. 34(f).

Judge Crabb wrote an opinion in which she carefully addressed the materials relied upon by the defendants in support of their motion for summary judgement, and the opposition offered by Speth. Summary judgement for the defendants is proper unless Speth makes a showing sufficient to establish each essential element on which she would bear the burden of proof at trial. *See Plair v. E.J. Brach & Sons, Inc.,* 105 F.3d 343, 346(7th Cir. 1997). Judge Crabb

declined to consider Speth's references to allegations made in the complaint. Although Speth filed an affidavit, many assertions in it are hearsay and therefore inadmissable at trial. Other assertions amount to mere speculation. *See Anderson v. Stauffer Chemical Co.*, 965 F.2d 397, 402 (7th Cir. 1992) (citations omitted). The district court analyzed the material properly before it at the summary judgement stage, and determined as to each claim that Speth had failed to produce any evidence to establish one or more elements of the prima facie case.

Speth's thirty-page brief on appeal consists largely (16 pages) of 12 questions, labeled Statement of Issues for Review, and only six pages of Summary of Argument and Argument. Although Speth claims to present "information which shows that genuine issues exist," her attempt fails. Speth again relies upon inadmissable hearsay, and produces no authorities to challenge the ruling that the statements are hearsay and therefore inadmissable. Speth also fails to provide any authority to refute the ruling that certain incidents can not be considered because if they occurred, they had occurred more than 300 days before her administrative filing.

Speth's brief fails to demonstrate, from the record, any flaw in the district court's reasoning. "Even pro se litigants . . . must expect to file a legal argument and some supporting authority." *United States ex rel. Verdone v. Circuit Court for Taylor County,* 73 F.3d 669,673 (7th Cir.

1995)(per curiam). *See also* Fed.R.App.P. 28(a)(6) (appellant must present a reasoned argument supported by legal authority). As we have said elsewhere: "A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority. . .forfeits the point. We will not do [her] research for [her]." *Pelfresne v. Village of Williams Bay,* 917 F.2d 1017, 1023 (7th Cir. 1990).

Speth attempts to rely, in part, on depositions that were not before the district court. On June 5, 1997, Speth deposed both Allen Schmidt and Karl Hauth. However, she had filed her response to the defendants' summary judgement motion on May 5, 1997. The depositions were not made part of her response or otherwise called to the judge's attention. They were not returned to this court as part of the record and we are, therefore, precluded from considering them on appeal. *See* Fed.R.Civ.P. 56(e).

Finally, two of Speth's assertions suggest a claim of frequent ex parte communications between Judge Crabb and the defendants' attorney, and a claim that the magistrate judge altered the record. Such claims are most unlikely, and nothing in the record supports them.

Accordingly, the decision of the district court is

AFFIRMED.

unsigned

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Margaret Speth,

Plaintiff,

v.

Capitol Indemnity Corporation, Frank Zillner, Virgie Schulte, and George Fait,

Defendants.

OPINION AND ORDER

96-C-855-C

This is a civil action for monetary relief in which plaintiff seeks relief from her former employer and three of its agents for gender discrimination and retaliation. Plaintiff worked for five years as a programmer in the data processing department at defendant Capitol Indemnity Corporation. During that time, she was not given the same responsibilities or opportunities for training as her male co-workers. She contends that defendants gave her negative annual reviews and a salary that was inappropriately low for her position simply because she was a woman. Additionally, plaintiff alleges that defendants engaged in outrageous conduct intended to humiliate and defame her and to sabotage her opportunities with other employers. Plaintiff, who eventually quit because of her working conditions, challenges defendants' conduct under the Equal Pay Act, Title VII of the Civil Rights Act and several state common law theories, including breach of contract, breach of

implied covenant of good faith and fair dealing, wrongful discharge and intentional infliction of emotional distress. In addition, plaintiff brings a claim under Title VII of the Civil Rights Act against defendant Capitol Indemnity Corporation only, as the act does not allow suit against the supervisory employees of an employer. Jurisdiction is present over plaintiff's federal claims under 28 U.S.C. §1331 and her state law claims under 28 U.S.C.§1367.

Now before the court is defendants' motion for summary judgement, in which they contend that any disparities in pay or training opportunities between plaintiff and her male co-workers resulted from differences in their seniority, experience and work duties. Defendants contend that plaintiff did not suffer any adverse employment actions in retaliation for her earlier discrimination complaints and that the averments in her affidavit testimony supporting the allegations of defendants' outrageous conduct are inadmissible. Defendants dispute plaintiff's state law claims on the following grounds: there existed no employment contract or implied covenant of fair dealing between themselves and plaintiff; plaintiff was not "discharged", constructively or otherwise; and she has not shown any injury as required in a claim for intentional infliction of emotional distress.

I conclude that defendants are entitled to summary judgement on all of plaintiff's claims. To the extent defendants paid plaintiff less than her male co-workers or subjected her to adverse employment actions, they have provided unrefuted non-discriminatory justifications for their conduct. The portion of plaintiff's affidavit that

discusses defendants' more extreme conduct is inadmissible hearsay and cannot be considered on this motion for summary judgement. Although plaintiff has provided admissible evidence that she was subjected to a few adverse employment actions, she has not supported her claim for retaliation by demonstrating that these actions were caused by her complaints of discrimination. Plaintiff has provided no evidence to support her state law contractual and intentional infliction of emotional distress claims and the record is insufficient to show that her working conditions were sufficiently intolerable to constitute constructive discharge.

I note that plaintiff filed a motion recently to hold defendants in contempt for failing to produce documents requested in a subpoena issued under Fed.R.Civ.P.45 on May 21, 1997. Defendants point out that plaintiff's motion for contempt is inappropriate because requests for documents from a party to a lawsuit should be made under Fed. R.Civ.P.34, which allows the served party thirty days to produce the documents. Because defendants produced the documents within thirty days (see Defs.' Resp. to Pl.'s Mot. for Contempt, Dkt.# 41 p.2) and because this ruling on summary judgement renders the issue moot, plaintiff's motion will be denied.

From the findings of fact proposed by the parties and for the sole purpose of deciding these motions, I find that the following facts are not in dispute. For reasons discussed in the Opinion section, infra, I have had to disregard many of the facts proposed by plaintiff.

UNDISPUTED FACTS

Defendant Capitol Indemnity Corporation is a Wisconsin corporation and defendants George Fait, Virgie Schulte and Frank Zillner are its president, personnel director and head of data processing, respectively. Plaintiff Margaret Speth worked for Capitol Indemnity in its data processing department from June 7, 1990 to September 13, 1995.

In addition to plaintiff, the data processing department had three employees: Ed Boyd, Karl Hauth and defendant Zillner. Plaintiff held the position of programmer, Boyd served as network administrator, Hauth was a programmer analyst and defendant Zillner was head of the data processing department. Both Boyd and Hauth had responsibilities beyond programming that plaintiff did not share, including network oversight.

Plaintiff holds a four-year degree in biology and a two-year degree in computer programming. Hauth holds a four-year degree in computer science. When Boyd began working for defendant Capitol Indemnity in 1991 he was pursuing a four-year degree in accounting and data processing. Prior to joining Capitol Indemnity, plaintiff had two to three years of programming experience and Hauth had experience in networks and programming.

During her employment with defendant Capitol Indemnity, plaintiff received the following compensation: a beginnning salary of $17,500; an October 1990 increase to $20,000; an October 1991 increase to $21,200; an

October 1993 increase to $23,700; and an October 1994 increase to $26,700. Karl Hauth was compensated as follows: he began in January 1989 at $18,000; in October 1989, his pay was increased to $20,500; in April 1990, to $22,200; in October 1990, to $24,000; in October 1991, to $25,000; in October 1992, to $29,000; in October 1993, to $33,000; and in October 1994, to $36,000. Ed Boyd received the following salaries: he started in 1991 at $13,000; his pay was increased $14,600 in April 1992; to $17,000 in November 1992; to $20,000 in August 1993; and to $25,000 in April 1994.

During plaintiff's employment, there were no positions in the data processing department to which she could have been promoted. Plaintiff did not apply for any promotions; neither did any of the other data processing employees. Although not officially promoted, Boyd and Hauth were provided additional responsibilities and appropriate training to handle these responsibilities. Specifically, Boyd received training to become a Certified Network Engineer. Defendants provided plaintiff with increasingly demanding assignments but did not give her the same training that Hauth or Boyd received. At her annual job evaluations, plaintiff informed defendant Zillner that she wanted to take on more responsibilities and that she believed she should receive a promotion. Defendant Zillner gave plaintiff lower job evaluations than she believed she deserved.

During non-business hours and on weekends, the data processing work areas were locked. All data process-

ing employees except plaintiff had a key to these facilities. When plaintiff wanted to work during off-hours, she had to borrow a key from a fellow employee. On one occasion she was prevented from working on a Saturday because she could not borrow a key. Boyd, Hauth and defendant Zillner worked during non-business hours more frequently than plaintiff did.

Plaintiff resigned her employment with defendant Capitol Indemnity on September 13, 1995. Some time before she quit, defendant Zillner gave her a programming assignment that was impossible to complete and would not give her other projects to work on during this period. On October 27, 1995, she filed a discrimination complaint with the Equal Rights Division of the State of Wisconsin.

OPINION

To prevail on a motion for summary judgment, the moving party must show that even when all inferences are drawn in the light most favorable to the non-moving party, there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R. Civ.P.56(c); Celotex Corp. v. Catrett, 477 U.S. 317,322 (1986); McGann v. Northeast Illinois Regional Commuter Railroad Corp., 8 F.3d 1174,1178 (7th Cir. 1993). If the party opposing summary judgement fails to make a showing sufficient to establish the existence of an essential element on which he or she will bear the burden of proof

at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322. This evidence may be either affidavits, depositions or answers to interrogatories. Fed. R.Civ.P.56(e). Moreover, such affidavits must be made on personal knowledge and set forth such facts as would be admissible in evidence. Id.

To successfully oppose defendants' motion for summary judgment, plaintiff must support with admissible evidence each necessary element of her federal and state law claims. Celotex, 477 U.S. at 322. In responding to defendants' motion, plaintiff has relied on documents and testimony that are not acceptable under Fed. R. Civ. P. 56(e) and which cannot be considered in determining whether she has met her summary judgment burden. In plaintiff's response to defendants' proposed findings of fact, she refers to her complaint several times to support her factual assertions. Because an allegation in a complaint cannot be relied on to create a factual dispute at the summary judgment stage, such references will be disregarded.

In addition, plaintiff supplements many of her factual assertions with citations to her May 5, 1997 affidavit. Although an affidavit is an appropriate document with which to oppose a motion for summary judgment, it is effective only to the extent that it is based on the personal knowledge of the affiant and sets forth facts that would be admissible into evidence. Fed. R. Civ. P. 56(e). Plaintiff's affidavit contains much testimony that would be inadmissible at trial because it is not based on plaintiff's personal knowledge but instead relies on "hearsay", that is, evidence

of statements made by someone other than the person testifying and offered to prove that the substance of the statements is true. Fed. R. Evid. 801(c). Generally, hearsay is not admissible at trial. Fed. R. Evid. 802. To avoid hearsay problems, parties should present the testimony of an individual with direct personal knowledge of the relevant factual matter.

In paragraphs two and six of plaintiff's affidavit, she attempts to challenge the educational credentials of Hauth and Boyd.This information is inadmissible hearsay because plaintiff has no direct knowledge of her co-workers' school records but only repeats statements of university employees allegedly made to her over the telephone. Plaintiff cites paragraph five of her affidavit to support her contention that defendants gave Hauth credit and a bonus for a program written by plaintiff. This paragraph relies on both the hearsay statements of Hauth asserting that he had received $5,000 and of others asserting that Hauth had taken credit for her programs. The only admissible evidence in this paragraph is that plaintiff heard Hauth answering questions about one of her programs as if he had written it, which is irrelevant to plaintiff's claims against defendants.

Plaintiff alleges that Hauth and defendant Zillner attempted to photograph her while she was in a hospital emergency room and that Zillner distributed photos to male employees at defendant Capitol Indemnity of a naked woman that he said was plaintiff. Paragraph seven of plaintiff's affidavit, with which she supports her assertion, is largely inadmissible. Plaintiff does not testify that she

witnessed the distribution of any photographs, saw the photographs themselves or heard the comments of Zillner. This portion of her affidavit relies solely on the hearsay statements of co-workers. The only admissible evidence in paragraph seven is that, while in the hospital, plaintiff heard laughter she attributed to Zillner and Hauth and heard a nurse say "don't let them take a picture." It is unclear what conclusions, if any, can be drawn from this evidence but it is quite certain that the evidence does not support plaintiff's allegations regarding the distribution of photographs.

Plaintiff makes several other factual assertions that fail for the same reason. Her allegation that defendant Schulte hired women to impersonate her relies completely on the hearsay statements of a psychiatrist in her church choir. Speth Aff. P 10. Plaintiff did not hear the requests Schulte allegedly made of plaintiff's other employers to testify against plaintiff or fire her. Id. at P 12. She presumably heard of these requests through her employers but has failed to procure their direct testimony regarding the conversations. Plaintiff alleges that she personally overheard Schulte tell a fellow employee at Capitol Indemnity to make false reports regarding problems with plaintiff's work; this allegation is admissible and will be addressed below. Plaintiff supports her assertion that defendant Zillner paid a prospective employer $1,000 not to hire her with averments in her affidavit that she saw Zillner at this employer's offices and later overheard him say that he only had to give them $1,000 and he would have given them more. Plaintiff's conclusion is purely speculative and the testi-

mony relies on the hearsay statement of Zillner that he gave an unspecified individual money for an unspecified reason.

Having determined which evidence is properly before the court, I turn now to the merits of plaintiff's claims.

A. Federal Claims

1. Discrimination

a. Equal Pay Act

Both the Equal Pay Act, 29 U.S.C §206(d)(1), and Title VII of the Civil Rights Act, 42 U.S.C §2000(a)(1), prohibit employers from treating employees unfavorably because of their gender. The Equal Pay Act provides a narrower prohibition, addressing only wage discrimination, and will be addressed first. To establish a prima facie case of wage discrimination, plaintiff must show that 1) she was paid less than a male employee; 2) both employees performed work that required equal skill, effort and responsibility; and 3) both employees had similar working conditions. Dey v.Colt Construction and Development Co., 28 F.3d 1446, 1461 (7th Cir. 1994). An employer can refute a prima facie case by showing that the pay disparity is based on 1) a seniority system; 2) a merit system; 3) a system based on quality or quantity of production; or 4) any factor other than gender. Id. (citing 29 U.S.C. §206(d)(1)).

There is a question whether plaintiff has met the first prong of the prima facie test for pay discrimination

regarding her co-worker Ed Boyd because the undisputed facts show that she received a higher salary than Boyd for all but six months of her employment (April to October 1994). Regardless, plaintiff fails to meet the remaining two prongs for all three male employees. The undisputed facts show that defendant Zillner was her supervisor and head of the data processing department and plaintiff has introduced no evidence demonstrating that he and she performed equal work under similar working conditions. Although plaintiff has alleged that both Hauth and Boyd had programming responsibilities similar to hers, she has not contested defendants' proposed facts that the two male employees had additional responsibilities beyond programming that plaintiff did not share and that, unlike plaintiff, were often required to work during evenings and weekends. Additionally, defendants have adequately justified the higher pay received by Hauth on the basis of his seniority and his more advanced educational background. Dey, 28 F.3d at 1462. Defendants are entitled to summary judgment on plaintiff's claim under the Equal Pay Act.

b. Title VII

Title VII goes beyond the Equal Pay Act's proscription of wage discrimination and prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment" on the basis of sex. 42 U.S.C. §2000e-2(a)(1). Under Title VII, plaintiff may sue only her employer, in this case defendant Capitol Indemnity.To establish a prima facie

case of sex discrimination, plaintiff must show that: 1) she was a member of a protected class; 2) she performed her job satisfactorily; 3) she suffered an adverse employment action; and 4) her employer treated similarly situated male employees more favorably. Cheek v. Peabody Coal Company, 97 F.3d 200,204 (7th Cir. 1996). Defendants may rebut a prima facie case by articulating a legitimate, non-discriminatory reason for their actions. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993). It is then plaintiff's burden to show that the justification given by defendants is pretextual. Id. at 507-08.

As explained in the opinion and order entered herein on March 25, 1997, a party bringing a Title VII suit in Wisconsin may not challenge conduct that occurred more than 300 days before the party filed its charge with the state Equal Rights Division or the Equal Employment Opportunities Commission. See Galloway v. General Motors Service Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996); Wisconsin Employment Law, §§ 14.181, 14.247 (1994). Plaintiff filed her administrative claim on October 27, 1995. Therefore, the statute of limitations precludes her from supporting her Title VII claim with conduct that has occurred before December 31, 1994. However, plaintiff may seek relief for earlier acts under the cumulative conduct exception if the acts are linked in time and circumstance with more recent behavior and if the earlier actions by themselves were not sufficient to make plaintiff aware that she had a substantial Title VII claim. Galloway 78 F.3d at 1165.

Plaintiff argues that the earlier disparity in pay, training and promotions between her and her male counterparts was linked to post-December 31, 1994 conduct because the disparities increased each year, making the limitations period inapplicable. This argument ignores the second requirement of the cumulative conduct exception: the otherwise time-barred acts alone must not give rise to a Title VII claim. Because the pre-1995 conduct of which plaintiff complains, pay differentials and unequal access to training and promotions, would have supported independent Title VII claims and therefore triggered the 300-day limitations clock, she cannot avail herself of the cumulative conduct exception.

Plaintiff has not specified when the conduct she challenges occurred, making it impossible to know which actions took place after December 31, 1994 and are appropriate to consider in support of her Title VII claim. However, this deficiency requires no further mention because plaintiff has failed to establish a prima facie Title VII case even when her allegations are considered in their entirety, without regard for the limitations period. As explained above, plaintiff has failed to demonstrate that defendants engaged in wage discrimination because she has not rebutted their non-discriminatory reason for providing a higher salary to Hauth. Plaintiff's challenge to her annual performance reviews fails because negative evaluations standing alone do not constitute an "adverse employment action" under Title VII. Smart v. Ball State University, 89 F.3d 437, 442 (7th Cir. 1996). Because plaintiff has not

alleged that her evaluations led to any material alterations in her employment, such as diminished responsibilities or termination, see id., she has not made a prima facie showing that they constituted actionable discrimination.

Plaintiff cannot survive summary judgment on her claim that she was denied equal access to training and promotions. To make out a prima facie case under Title VII for denial of a promotion, plaintiff must show that a male received a promotion for which she was qualified. Emmel v. Coca-Cola Bottling Co. of Chicago, 95 F.3d 627, 629 (7th Cir. 1996). Defendants argue that no prima facie case exists because no employees in the data processing department, male or female, received an official promotion during plaintiff's employment. However, defendants concede that both Boyd and Hauth were given additional responsibilities and training that plaintiff did not receive and plaintiff alleges that she was qualified to take on these responsibilities. Assuming for the purpose of this motion that these facts establish a prima facie case of discriminatory denial of promotion, defendants have provided a non-discriminatory justification for their actions. Defendants' undisputed facts show that the additional responsibilities and training provided to Hauth and Boyd were consistent with their existing non-programming duties that were not shared by plaintiff. Plaintiff's averments in her affidavit that she was qualified to handle these responsibilities do not refute defendants' non-discriminatory explanation for their conduct. Rabinovitz v. Pena, 89 F.3d 482, 487 (7th Cir. 1997) (testimony that plaintiff most qualified person for position

did not refute employer's non-discriminatory reason for promoting someone else). Because plaintiff has not shown that defendants' justification is pretextual, her claim that she was denied training and promotions in violation of Title VII must fail.

Defendants' refusal to provide plaintiff with her own key to the computer facilities at Capitol Indemnity requires little discussion. The consequences of this action, that plaintiff was required to borrow a key when she needed off-hour access to the facilities and that on one occasion in five years she was prevented from working on a Saturday, are not sufficient to qualify them as an adverse employment action. Moreover, defendants have provided a non-discriminatory justification for providing keys to Boyd, Hauth and Zillner and not to plaintiff: the other employees worked during non-business hours more often than plaintiff did.

In response to defendants' motion for summary judgment, plaintiff alleges for the first time that in defendant Schulte's office on an undisclosed date, defendant Fait told plaintiff to take off her clothes and lie on the floor. She refused and left the office and now speculates that this incident is one of the reasons she was denied the same opportunities for advancement that males received. This allegation adds nothing to plaintiff's claim. Even assuming it is true (which is unlikely, given plaintiff's failure to mention it sooner), it must have happened more than 300 days before plaintiff filed her discrimination charge. Otherwise, it could hardly be a reason for defendants' allege unequal treatment of plaintiff, which supposedly took place over several

years. As an isolated incident occurring outside the limitations period, this request by Fait cannot be considered in deciding plaintiff's Title VII claim.

2. Retaliation

Both the Equal Pay Act and Title VII contain provisions barring employers from retaliating against employees who raise discrimination claims.29 U.S.C.§ 215(a)(3) (Equal Pay Act); 42 U.S.C.§ 2000e-3(a)(Title VII). To make out a prima facie case of retaliation, plaintiff must show that 1) she engaged in a protected activity; 2) she suffered a subsequent adverse employment action; and 3) there exists a casual connection between the protected activity and the employment action. Smart, 89 F.3d at 440. Defendants concede the first requirement, admitting that plaintiff engaged in protected activity in February 1992 when her attorney sent a letter to defendant Fait complaining of sex discrimination and threatening litigation. The remaining two elements require more discussion.

In the retaliation claim, plaintiff alleges that defendants engaged in "[m]any instances of retaliation and harassment." In response to defendants' motion for summary judgment, plaintiff has proffered admissible evidence regarding the following incidents that could be construed as retaliatory conduct: her negative annual reviews; her lower pay; the denial of training and promotions; defendant Zillner's failure to recommend her for another position; and defendant Schulte's instruction to a fellow employee to fabricate unfavorable reports about plaintiff's performance.

As discussed above, negative performance evaluations standing alone are not an "adverse employment action" sufficient to create a prima facie case of retaliation. Smart, 89 F.3d at 442. Further, it is questionable whether plaintiff has shown that her compensation constitutes an adverse employment action, as she continued to receive annual raises throughout her employment. For the purpose of this motion, I will assume her allegation to be that her raises should have been greater.

Regardless, plaintiff's retaliation claim based on her salary fails under the prima facie requirement that she show a casual link between her protected expression and the adverse employment action. Because the alleged retaliatory conduct, her low pay, occurred equally both before and after the 1992 letter, no casual connection can be found. McDonnell v. Cisneros, 84 F.3d 256, 259 (7th Cir. 1996). Plaintiff does not contend that either her salary or the nature of her raises were altered after the letter was sent; to the contrary, she contends that her salary was unfairly low from the beginning of her employment. Her retaliation claims based on her annual reviews and her access to training and extra responsibilities share the same deficiency; she alleges that she received negative evaluations and was denied any advancement throughout her employment. Any insufficient pay, disparaging reviews or denied opportunities that occurred after the 1992 letter were merely a continuation of of earlier conduct and cannot be attributed to a retaliatory motive. Id.

The remaining evidence of retaliation consists of

plaintiff's affidavit testimony that she overheard defendant Zillner withhold his recommendation for her in a phone call with a potential employer and that she overheard defendant Schulte tell an employee of Capitol Indemnity to fabricate an unfavorable report. The admissibility and weight of plaintiff's testimony regarding only half of a phone conversation with an unidentified third party are questionable. Additionally, it is difficult to conclude that Schulte's comment constituted an adverse employment action. These issues need not be addressed, however, because plaintiff's retaliation claims based on the two overheard conversations fall as a result of plaintiff's failure to introduce any evidence from which a reasonable jury could conclude that the events were caused by her protected activity.To avoid summary judgment, plaintiff must demonstrate that defendants would not have taken the adverse action "but for" the 1992 letter. McKenzie v. Illinois Department of Transportation, 92 F.3d 473, 483 (7th Cir. 1996). This burden can be met by showing that the adverse action occurred shortly after she engaged in the protected activity. See Johnson v. City of Fort Wayne, Indiana, 91 F.3d 922, 939 (7th Cir. 1996). Having provided no evidence regarding the date of these conversations, plaintiff has not shown that they even postdated the 1992 letter, let alone that they occurred within a time period that would allow a jury to infer that her complaint of discrimination caused them. Because plaintiff has failed to make a prima facie case of retaliation, defendants will be granted summary judgment on this claim.

B. State Law Claims

In the March 25, 1997 opinion and order, I noted that this court has supplemental jurisdiction over plaintiff's state law claims under 28 U.S.C. § 1367(a) because they arose from the same operative facts as her federal claims. The general rule is that when federal claims fall out before trial, federal courts should relinquish jurisdiction over supplemental state law claims. Carr v. Cigna Securities, Inc., 95 F.3d 544, 547 (7th Cir. 1996). An exception to this rule exists if, at the time the federal issues are disposed of, it is clear how the supplemental claims can be decided. Wright v. Associated Insurance Companies, Inc., 29 F.3d 1244, 1251 (7th Cir. 1994). Because plaintiff's supplemental claims can be resolved without additional proceedings or consideration of difficult state law issues, retention of jurisdiction is appropriate. Id. at 1252 (citing Brazinski v. Amoco Petroleum Additives Company, 6 F.3d 1176, 1182 (7th Cir. 1993).

1. Breach of contract and implied covenant of good faith

Plaintiff alleges in her complaint that defendants' conduct violated the employment contract and implied covenant of good faith created by defendants' employee handbook and related writings. In response to defendants' motion for summary judgment, plaintiff has provided no argument or evidence in support of her claim or introduced the employment policies on which the claim is based. Because plaintiff has failed to introduce any evidence from

which a reasonable jury could conclude that defendants breached an employment contract or an implied covenant of good faith, defendants are entitled to summary judgment on this claim.

2. Wrongful discharge

Under Wisconsin law, an employee may recover for wrongful discharge if her termination violates a well-established and important public policy. Wandry v. Bull's Eye Credit Union, 129 Wis. 2d 37, 41, 384 N.W.2d 325, 327 (1986). Although plaintiff admits that she was not terminated, she contends that she was constructively discharged. To prove constructive discharge, plaintiff must show that her working conditions were so intolerable that a reasonable person would have felt compelled to resign. Chambers v. American Trans Air, Inc., 17 F.3d 998, 1005 (7th Cir. 1994), cited in Selerski v. Village of West Milwaukee, No. 96-1041, 1997 WL 289988, at *4 (Wis. App. June 3, 1997).

Plaintiff has introduced evidence that she quit after defendant Zillner gave her an "impossible" programming assignment and provided her with no other work during the last several months of her employment. Plaintiff contends that these actions, along with the conduct discussed under her other claims, made her continued employment intolerable. Other evidence shows that plaintiff was paid less, received less training and advancement, and given less favorable reviews than she thought appropriate, that defendant Zillner refused to recommend her for an unspecified

job and that on one occasion defendant Schulte asked an employee to make a false report about plaintiff. These conditions do not support a constructive discharge claim. See Rabinovitz, 89 F.3d at 489 (holding that similar evidence, while reflecting "friction" between employee and supervisors, did not constitute constructive discharge). Similarly, plaintiff's allegation that she was given no work other than an assignment she found "impossible" is insufficient to show that her working conditions were intolerable. She does not specify how long she worked on the assignment or what the practical effects of the assignment were on her working environment. Because plaintiff has not produced admissible evidence from which a jury could conclude that her employment conditions would have caused a reasonable person to resign, defendants will be granted summary judgment on her wrongful discharge claim.

3. Intentional infliction of emotional distress

A claim for intentional infliction of emotional distress has four elements: 1) the defendant's conduct was so extreme and outrageous that an average member of the community would regard the conduct as a complete denial of the plaintiff's dignity; 2) the defendant intended to cause the plaintiff's emotional distress; 3) the defendant's conduct caused the plaintiff's injury; and 4) the plaintiff suffered an extreme disabling emotional response to defendant's conduct. Heideman v. American Family Insurance Group, 163 Wis. 2d 847, 861-62, 473 N.W.2d 14, 20 (Ct. App. 1991). Although plaintiff pleaded the latter three elements specifi-

cally in her complaint, she has introduced no evidence supporting them in response to defendants' motion for summary judgment. The record contains no evidence that plaintiff suffered a disabling response to defendants' conduct or that she experienced any injury at all. Further, the admissible evidence, as discussed above, does not show that defendants engaged in any conduct that could be considered a complete denial of plaintiff's dignity. Because plaintiff has not supported any of the necessary elements of an intentional infliction of emotional distress claim, defendants will be awarded summary judgment on this issue.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Capitol Indemnity Corporation, Frank Zillner, Virgie Schulte and George Fait is GRANTED and plaintiff Margaret Speth's motion for contempt is DENIED. The clerk of court is directed to enter judgment for defendants Capitol Indemnity Corporation, Frank Zillner, Virgie Schulte and George Fait and close this case.

Entered this 7th day of July, 1997.

BY THE COURT:

s/ Barbara B. Crabb
Barbara B. Crabb
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Margaret Speth,
Plaintiff,

vs.,

Capitol Indemnity Corporation,
Frank Zillner, Virgie Schulte,
and George Fait,
Defendants.

JUDGMENT IN A CIVIL CASE

Case No.: 96-C-0855-C

This action came for consideration before the court with U. S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that the motion for summary judgment of defendants Capitol Indemnity Corporation, Frank Zillner, Virgie Schulte and George Fait is GRANTED. Judgment is entered for defendants Capitol Indemnity Corporation, Frank Zillner, Virgie Schulte and George Fait, and this case is CLOSED.

s/ Joseph W. Skupniewitz — July 11, 1997
Joseph W. Skupniewitz, Clerk of Court — Date